



**DEPARTMENT OF VETERANS AFFAIRS**  
Office of Labor-Management Relations  
Washington DC 20420

May 29, 2020

Thomas Dargon, Jr.  
Staff Counsel, National VA Council  
AFGE, AFL-CIO  
80 F Street, NW  
Washington, DC 20001

Sent electronically: thomas.dargon@afge.org

Re: National Grievance – NG 4/9/20

Dear Mr. Dargon:

I am responding to the above captioned national grievance filed on April 9, 2020. The issue in the grievance is whether the Agency failed to comply with the emergency sick leave provisions in the Families First Coronavirus Relief Act ("FFCRA"). Specifically, the grievance alleges the Agency violated Articles 2, 3, 47, and 49 of the MCBA, the FFCRA, the Fair Labor Standards Act ("FLSA") 5 U.S.C. §7116(a) and any other relevant articles, laws, regulations and past practices not herein specified.

To remedy the violations stated above, the Union requests the following:

- a. Return to the status quo ante;
- b. Fully comply with its contractual obligations under Articles 2, 3, 47, and 49 of the MCBA and its statutory obligations under 5 U.S.C § 7116(a);
- c. Provide emergency leave to eligible employees in accordance with the FFCRA;
- d. Distribute an electronic notice posting to all bargaining unit employees concerning the Agency's failure to satisfy bargaining obligations with the Union prior to implementing changes in conditions of employment;
- e. Restore leave to any employee who used leave as a result of being wrongfully denied emergency sick leave;
- f. Make-whole any employee adversely affected by the Agency's actions, including, back pay, liquidated damages and attorney's fees under the FLSA;
- g. Agree to any and all other remedies appropriate in this matter.

Statement of Facts:

- a. On March 18, 2020 the FFCRA was signed into law and requiring federal agencies to provide their employees with paid sick leave related to COVID-19. Under the Act the eligibility period covered April 1 to December 31, 2020
- b. March 24, 2020, DOL issued Field Assistance Bulletin No. 2020-1, entitled "Temporary Non-Enforcement Period Applicable to the Families First

Coronavirus Response Act,” which declared a 14-day period of non-enforcement of the FFCRA during the period of March 18 through April 17, 2020.

- c. On April 1, 2020, the Office of the Chief Human Capital Officer (OCHCO) issued a bulletin on the emergency leave provisions of FFCRA. On April 8, 2020 an update to the bulletin was issued advising of a temporary non-enforcement of the FFCRA for reasons including but not limited to the review of payroll systems and timekeeping procedures.
- d. On April 23, 2020 the OCHCO issued an update to previous versions entitled FFCRA – Version 2. This updated bulletin provided guidance on leave administration and implementation of the FFCRA, which included Division D, the Emergency Family and Medical Leave Expansion Act (EFMLEA) and Division E, the Emergency Paid Sick Leave Act (EPSLA).

#### Analysis:

The Union alleges the Agency failed to comply with the emergency leave provisions of the FFCRA and in so doing was in violation of the FLSA and the MCBA. The Agency refutes the violations alleged by the Union. Upon passage of the FFCRA, the Agency issued guidance on April 1, 2020, followed by an update to the original guidance on April 8, 2020. The updated guidance noted a temporary enforcement provision to the FFCRA in order to address how to properly process emergency leave requests within the VA’s payroll system and timekeeping procedures, among other things. This non-enforcement provision would be effective until April 17, 2020. Once the system and procedural issues were resolved, updated guidance was issued on April 23, 2020 on the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). That guidance outlined leave procedures for employees seeking EPSLA and addressed if an employee could have used EPSLA leave on, or after April 1, 2020, or could submit a request for retroactive substitution with qualifying documentation. This would include any variation of leave used prior to the OCHCO bulletin, dated April 23, 2020.

Further, the Agency has determined that all VHA employees would be excluded from the application of certain provisions under the EPSLA as those employees fit the definition of “health care provider” and “emergency responder” under 29 CFR § 826.30(c). The noted exemption may be applied for all qualifying reasons listed in 29 CFR § 826.20(a)(1), *except* that an employee may not be excluded from application of the EPSLA if the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 as described in 29 C.F.R. § 826.20(a)(1)(ii), or is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider as described in 29 C.F.R. § 826.20(a)(1)(iii).

The Union further alleges that the Agency refused to notify, consult, and negotiate in good faith prior to implementing the emergency leave changes, thereby committing an unfair labor practice under 5 U.S.C. §7116(a)(1) and (a)(5). With the declaration of the Coronavirus (COVID-19) as a pandemic, the Agency immediately took steps to address this unprecedented outbreak. When emergencies like COVID-19 arise, the Agency, as codified under the statute, can take whatever action that may be necessary to carry out the Agency’s mission during such times. With that being said, the Agency remains mindful of its obligation to negotiate procedures and arrangements on any changes made to conditions of employment during this pandemic and will meet those obligations once the crisis has been abated. In the interim, and as a show of good faith, the

Agency has made efforts to keep the Union apprised of changes as they evolve through email notification during this very fluid time. To date, the Agency has shared approximately 30 email notifications related to COVID-19 with the Union as it works to maintain the safety of the veterans we serve and VA employees.

With the implementation of FFCRA, the Agency is in full compliance with the provisions of this new law and has provided guidance to field facilities on how the law is to be applied. Management is working diligently to address leave matters where retroactive substitution of EPSLA is appropriate. The Agency affirms that it did not violate the provisions of the MCBA and cited law.

Based upon the evidence available for review, including your grievance submission, it is the Agency's determination that your grievance is denied in whole.

Sincerely:

A handwritten signature in black ink, appearing to read "LeTricia Jackson".

LeTricia Jackson  
Labor Relations Specialist  
Office of Labor-Management Relations (LMR)